Nos. 79-1711, 79-1760, 79-1754 and 80-12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1711

MIDDLESEX COUNTY SEWERAGE AUTHORITY, *et al.*,
Petitioners

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*,
Respondents

(And three other Petitions listed verso.)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONSOLIDATED BRIEF OF RESPONDENTS, NATIONAL SEA CLAMMERS ASSOCIATION AND GOSTA LOVGREN, IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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Other Petitions to which this Brief replies are as follows:

No. 79-1760

City of New York, et al.,
Petitioners

v.

National Sea Clammers Association, et al.,
Respondents

No. 79-1754

The Joint Meeting of Union and Essex Counties,
Petitioner

v.

National Sea Clammers Association, et al.,
Respondents

No. 80-12

Environmental Protection Agency, et al.,
Petitioners

v.

National Sea Clammers Association, et al.,
Respondents

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1711

Middlesex County Sewerage Authority, Passaic Valley Sewerage Commissioners, Middletown Sewerage Authority, Bergen County Sewer Authority, and The Linden Roselle Sewerage Authority,

Petitioners

v.

National Sea Clammers Association and Gosta Lovgren,
Respondents

No. 79-1760

City of New York, Honorable Abraham Beame,
Petitioners

v.

National Sea Clammers Association and Gosta Lovgren,
Respondents

No. 79-1754

The Joint Meeting of Union and Essex Counties,
Petitioner

v.

National Sea Clammers Association and Gosta Lovgren,
Respondents

No. 80-12

Environmental Protection Agency, Russell E. Train, Individually and as Administrator of the United States Environmental Protection Agency, United States Army Corps of Engineers, and Martin R. Hoffman, Individually and as Secretary of the United States Department of the Army,

Petitioners

v.

National Sea Clammers Association and Gosta Lovgren,
Respondents[1]

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONSOLIDATED BRIEF OF RESPONDENTS, NATIONAL SEA CLAMMERS ASSOCIATION AND GOSTA LOVGREN, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

1. The following were also parties to the proceedings below, but have not participated in the instant petitions: New York Department of Environmental Conservation, Ogden R. Reid, individually and as Commissioner of the New York Department of Environmental Conservation, New Jersey Department of Environmental Protection, David J. Bardin, individually and as Commissioner of New Jersey Department of Environmental Protection, West Long Beach Sewer District, County of Westchester, Department of Environmental Facilities, City of Long Beach and City of Glen Cove.

INTRODUCTION

Four petitions for a writ of certiorari have been filed following the entry of an opinion and judgment by the United States Court of Appeals for the Third Circuit on February 5, 1980. (App. p. 1a *et seq.*, and pp. 37a-39a.)[2] Although no two petitions raise precisely the same issues, there are several issues and arguments which are common to more than one petition. Thus, in the interests of efficiency and clarity, we have prepared a single, consolidated response to these petitions.

JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. §1254(1).

2. Appendix references are to the appendix accompanying the initial Petition for a Writ of Certiorari filed on behalf of Middlesex County Sewerage Authority, *et al.*, on April 29, 1980, No. 79-1711.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Third Circuit properly hold that the District Court had jurisdiction under the Federal Water Pollution Control Act (FWPCA) and Marine Protection, Research, and Sanctuaries Act (MPRSA) to entertain plaintiffs' claims that defendants violated their duties under those Acts, even though plaintiffs did not strictly comply with certain notice provisions contained in the Acts?

2. Are the sixty-day notice provisions in FWPCA and MPRSA satisfied by the giving of notice sixty days prior to any judicial action on the suit or claim?

3. Did the Third Circuit properly hold that the federal common law of nuisance has not been preempted by federal statutes, and that private plaintiffs have a cause of action under the federal common law of nuisance for money damages?

4. Did the Third Circuit properly hold that state sewerage authorities are municipal corporations to whom sovereign immunity under the Eleventh Amendment does not apply?

5. Did the Third Circuit properly hold that state tort claims acts may not preempt federal statutes or common law causes of action?

6. Did the Third Circuit properly hold that plaintiffs have a cause of action independent of the remedies expressly provided for by FWPCA and MPRSA, on which plaintiffs may bring suit pursuant to the savings clauses in those statutes?

COUNTERSTATEMENT OF THE CASE

Respondents in this litigation are the National Sea Clammers Association, an association whose members earn their livelihood through the harvesting of fish, lobster, and other shellfish from the ocean and ocean beds of the Atlantic Ocean, adjacent to the states of New York and New Jersey, and Gosta Lovgren, an individual similarly employed. The petitioners and certain other respondents[3] include various federal, state, and local officials, as well as governmental departments, involved with environmental protection or sewage treatment and disposal.

On January 14, 1977, respondents, National Sea Clammers Association and Gosta Lovgren, brought suit on behalf of themselves and all others similarly situated in the United States District Court for the District of New Jersey. The respondents' complaint alleged that defendants either discharged or permitted the discharge of various nutrient-rich sewage and other toxic substances and wastes into the Atlantic Ocean or its tributaries. During the summer of 1976, these discharges caused a massive and rapid growth of algae ranging in an area from Long Island to Cape May, New Jersey, and extending from a few miles offshore to approximately twenty miles offshore. When this massive algal bloom died, its residuals settled on the ocean floor, creating a condition of anoxia, or oxygen deficiency, in and about the water near the ocean's floor. This condition resulted in the death and destruction of an enormous amount of marine life, particularly with respect to the shellfish and other ocean-bottom dwellers and other marine life unable to escape the blighted area. As a result, the commercial

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3. The parties who were named as defendants in the action below, but who have not filed petitions on their own behalf are identified in footnote one, *supra*. Hereinafter "respondents" will be used only to refer to the National Sea Clammers Association and Gosta Lovgren.

fishing, clamming and related industries, in which respondents earned their livelihood, were virtually destroyed.

In their complaint, respondents alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4361 (1976), the Federal Water Pollution Control Act, 33 U.S.C. §§1251-1376 (1976 and Supp. I), the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§1401-1444 (1976), the Rivers and Harbors Act of 1899, 33 U.S.C. §407 (1976), the New York Environmental Conservation Law, N.Y. Environ. Conserv. §1-0101 (McKinney 1973), the New Jersey Conservation and Development Law, N.J.S.A. 13: 10-1 (1968), the federal common law of nuisance, and the Fifth, Ninth and Fourteenth Amendments to the Constitution. The complaint sought injunctive relief, damages, mandamus to compel compliance with statutory duties, the impositions of fines and penalties for certain of the violations alleged, the award to plaintiffs of one-half of the fines assessed, and the reasonable expenses of the litigation, including expert witness and attorneys' fees.

Each of the defendants below moved for dismissal of all claims on the grounds that the District Court lacked subject matter jurisdiction over the action, or that the respondents had failed to state a claim upon which relief could be granted. Treating these motions as motions for summary judgment, the District Court granted said motions as to each cause of action alleged. The District Court dismissed the complaint, with prejudice, as to all claims except for two which arose under state law, which were dismissed without prejudice.

On appeal, the Third Circuit reversed the judgment of the District Court to the extent that the District Court judgment dismissed respondents' claims under the Federal Water Pollution Control Act, the Marine Protection, Research, and Sanctuaries Act, and respondents' common law nuisance and maritime tort claims. The Third

Circuit affirmed the District Court's dismissal of respondents' Refuse Act claim, Federal Tort Claims Act and state tort claims, and the constitutional claims. With respect to the District Court's dismissal of the National Environmental Policy Act claim, the Third Circuit vacated the District Court's order with direction that this claim be remanded for consideration of the record developed on remand.

ARGUMENT

A. The holding of the Court of Appeals that the failure of plaintiffs strictly to comply with the notice provisions of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251 et seq., and the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. §1401 et seq., did not deprive the District Court of jurisdiction to hear plaintiffs' claims to enforce the provisions of those Acts is correct, and is supported by the more weighty and better reasoned authorities.

Each of the petitioners has sought review of that portion of the Court of Appeals' decision holding that plaintiffs are entitled to prosecute their claims under the FWPCA and MPRSA despite the failure to comply with the notice provisions contained in those statutes. Although recognizing that a conflict exists among the circuits with respect to this issue, respondents submit that the better reasoned decisions of other Courts of Appeal support the decision here under review.

The adoption of FWPCA in 1972 signified Congressional recognition that " . . . the restoration of the natural, chemical, physical and biological integrity of the nation's water is essential", and that the prior " . . . national effort to abate and control water pollution has been inadequate in every vital aspect". S. Rep. No. 414, 92d Cong., 1st Sess., reported in 1972, U.S. Code Cong. & Ad. News 3668, 3674. The resulting legislation evidences the Congressional intent that citizen participation be expanded in the enforcement of legislation aimed at the improvement of our environment. The Court of Appeals carefully reviewed the legislative history surrounding the enactment of FWPCA and correctly concluded that this legislation was intended " . . . to provide generally for citizens' suits which would not be subject to the jurisdictional amount requirement and yet would provide for private attorney general enforcement to the

maximum degree permitted by the Court's *Sierra Club* decision." (App. pp. 8a-9a.)

Consistent with the legislative intent to expand the role of citizen participation in the enforcement of a clean environment, the FWPCA and MPRSA[4] not only created specific statutory authority for the initiation of environmental litigation by private parties, but also sought to preserve all rights and remedies which existed under all other law. Thus, both the FWPCA and MPRSA contain savings clauses specifically preserving rights and remedies " . . . under any statute or common law . . . . " As the Court of Appeals correctly held, and as the Courts of Appeal for the Second and District of Columbia Circuits had previously held[5], the remedies expressly provided for in these statutes are not the exclusive methods of enforcement of the statutes. Rather, the notice provisions in each statute only apply when a non-injured member of the public chooses to enforce the provisions of the Acts. Private parties injured by the alleged violation, such as respondents, have an alternate basis for suit under the Acts pursuant to the savings clauses and the general federal question jurisdiction of the District Court. 28 U.S.C. §1331 (1976). As the Third Circuit correctly explained:

> Section 505(e) is a savings clause that preserves all rights to enforce the Act or seek relief against the administrator. Coupled with the general federal question jurisdiction it permits this suit to be brought by these parties. Moreover, unlike the private attorneys general provision of Section 505(a),

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4. The relevant statutory provisions and legislative histories of these two Acts are virtually indistinguishable. Thus, no separate analysis of MPRSA is required.

5. *Natural Resources Defense Council, Inc. v. Train* 510 F.2d 692 (D.C. Cir. 1974); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *Conservation Society of S. Vt., Inc. v. Secretary of Transportation*, 508 F.2d 927 (2d Cir. 1974), vacated, 423 U.S. 809 (1975).

> Section 505(e) provides an independent remedy for injured parties unburdened by the notice requirements of Section 505(b).

(App. p. 10a)

As the Third Circuit itself noted, and as respondents concede, a conflict does exist among the lower courts on the issue of whether the savings clauses of FWPCA and MPRSA authorize private enforcement of the Acts as an alternative to that authorized by the express provisions of these Acts.[6] However, respondents submit that the more weighty and more persuasively reasoned cases support the position that the savings clauses of these statutes were intended to preserve the rights of injured members of the public, such as respondents herein, to bring suit to enforce the terms of the Acts, despite the expansion of remedies made available to non-injured parties by the express provisions of the statute.

1. *The decision of the Court of Appeals is also supported by alternative grounds which the Court did not pass upon.*

In addition to their arguments as noted above, respondents also submit that it is unnecessary for this Court to grant the petitions with respect to the issue of the notice provisions of the FWPCA and MPRSA inasmuch as the decision of the Court of Appeals is amply supported by an alternative ground which the Court did not rule upon.

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6. Only the Seventh Circuit *City of Hyland Park v. Train*, 519 F.2d 681, cert. denied, 424 U.S. 927, has reached a conclusion contrary to the views of the Second, Third, and District of Columbia Circuits, which were expressed in the instant case and in *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1974); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *Conservation Society of St. Vt., Inc. v. Secretary of Transportation*, 508 F. 2d 927 (2d Cir. 1974), vacated 423 U.S. 809 (1975).

The notice provisions of these Acts " . . . are intended to afford the agency an opportunity to do the job, not to frustrate citizen action with procedural trickery . . . " W. Rodgers, *Environmental Law*, §1.13 (1977). Thus, the notice provisions are to be construed "flexibly and realistically", consistent with this purpose. *Friends of the Earth v. Carey*, 535 F.2d 165, 175 (2d Cir. 1976). Such a flexible and pragmatic approach to interpreting the notice provisions of the Acts would merely require that sixty days elapse prior to District Court action on the complaint. Because of its analysis of the independent significance of the savings clauses, the Third Circuit did not pass upon this alternative interpretation. However, the court did indicate that it was favorably disposed to this view.[7] Respondents submit that this alternative is consistent with the fundamental purposes of the environmental legislation, including participation by the citizens in the enforcement of environmental legislation to the maximum extent possible.

In addition, it should be noted that compliance with the notice requirements of the FWPCA and MPRSA by respondents would have constituted a futile act in the present case. As has been previously noted, the damages about which respondents complaint had been incurred prior to the commencement of this litigation. Even if, as petitioners submit, the notice provisions of the statutes are designed to afford the alleged violator with the opportunity to remedy the alleged violation prior to the institution of suit, such legislative purpose would not have been advanced by the giving of notice in this case. Therefore, under the particular circumstances in this case, respondents were not required to comply with the notice provisions of the FWPCA and MPRSA.

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7. The Court of Appeals in discussing this issue stated, "We note, however, that it would be entirely permissible for this court to adopt the pragmatic approach to interpreting the 60-day notice provision by which we would merely require that sixty days elapse prior to District Court action on the complaint." (App. p. 5a-6a.)

B. The Court of Appeals correctly held that the federal common law of nuisance has not been preempted by federal statutes.

In their complaint, respondents alleged a cause of action and sought relief pursuant to the federal common law of nuisance. The District Court dismissed this count of respondents' complaint, but the Third Circuit reversed, holding, inter alia, that the 1972 amendments of the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act, as amended in 1977, had not preempted the federal common law of nuisance. Only petitioners in No. 79-1711, Middlesex County Sewerage Authority, et al., have questioned this aspect of the decision of the Third Circuit in their petition for a writ of certiorari.

In support of their argument that the federal common law of nuisance has been preempted by the enactment of FWPCA and MPRSA, petitioners in No. 79-1711 have placed their sole reliance on the decision in *Committee for Con. of Jones Falls Sewage System v. Train*, 539 F.2d 1006 (4th Cir. 1976). Petitioners' reliance on this decision is misplaced since the Fourth Circuit's discussion of the federal common law of nuisance in that case is dicta. Unlike the instant litigation, the alleged pollution in the *Jones Falls* case did not involve any allegations of interstate pollution. Indeed, the majority opinion noted:

> In controversies such as this one, there is present neither the reason nor the necessity for the invocation of a body of federal common law which was present in *Illinois v. Milwaukee*. This intrastate controversy is entirely local. The plaintiffs are Maryland citizens complaining of the conduct of public officials of the City and County of Baltimore, Maryland. 539 F.2d at 1009.

Unlike the harm alleged in *Jones Falls*, respondents in this litigation have alleged pollution in an important

public waterway and with significant interstate consequences. Accordingly, it is submitted that any discussion by the Fourth Circuit in the *Jones Falls* decision concerning the federal common law of nuisance was not necessary to the court's disposition of that case.

In any event, respondents submit that the legislative history of the environmental statutes involved in this litigation evidences a clear legislative intent that the federal common law of nuisance, as originally articulated by this Court in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), was not to be preempted. Moreover, the language of the statutes themselves clearly indicates that no preemption was intended. Both the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act contain savings clauses specifically preserving a party's rights under " . . . any statute *or common law* . . . " 33 U.S.C. §1365(e); 33 U.S.C. §1415(g)(5). With regard to the scope of the savings clause in the Federal Water Pollution Control Act amendments of 1972, the Senate Report provides:

> It should be noted . . . that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.* (Emphasis supplied.) S. Rep. No. 414, 92d Cong., 1st Sess. reported in 1972, U.S. Code Cong. & Ad. News 3668, 3746-47.

This legislative history plainly indicates that Congress did not intend the federal environmental statutes to preempt the developing case law in the area of the federal common law of nuisance.

1. In the alternative, this Court has already granted certiorari to review the decision of the Seventh Circuit in Illinois v. City of Milwaukee, *599 F.2d 151. Since that case also involves the issue of preemption of the federal common law of nuisance, review of the instant case is unnecessary.*

Alternatively, respondents submit that it is unnecessary for this Court to grant certiorari on this issue in view of this Court's earlier decision to grant certiorari in *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979), cert. granted, 48 U.S.L.W. 3902 (March 18, 1980). Since the *Illinois* case also involves the issue of preemption of the federal common law of nuisance, respondents submit that the instant petitions for certiorari on this issue should, for this reason alone, be denied.

Respondents respectfully submit that the Seventh Circuit's decision in *Illinois v. City of Milwaukee* reflects a careful analysis of the effect of federal statutes on the federal common law of nuisance, and that the Seventh Circuit's decision in that regard should be affirmed by this Court.

C. The holding of the Court of Appeals that private parties have standing to recover damages based upon a common law of nuisance claim is supported by the more weighty and better-reasoned authorities.

1. Standing of Private Parties.

Petitioners in 79-1711 (Middlesex County Sewerage Authority, et al.), 79-1760 (City of New York, et al.,), and 79-1754 (The Joint Meeting of Union and Essex Counties) have asserted that respondents, as private parties, lack standing to bring an action under the federal common law of nuisance. It is their contention that this Court's decision in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), evidences an intent to limit standing under the federal common law of nuisance to states. However, such a reading of the *Illinois* decision is overly re-

strictive and ignores the broader holding of that case. While it is true that the plaintiff in *Illinois* was a state, and that the two cases chiefly relied upon by the Court involved actions brought by states,[8] the broader holding of that decision is that, "pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of §1331(a)." 406 U.S. at 99. The *Illinois* Court further explained that, "Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions.' " *Id.* at 105.

Thus, it was not the character of the plaintiff as a state which motivated this Court to apply the federal common law of nuisance in the *Illinois* case, but rather it was the subject matter of the dispute (a navigable waterway of the United States) and the need for a uniform rule of law to govern this dispute. This was confirmed by the Court when it noted that, "it is not only the character of the parties that requires us to apply federal law . . . . where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." *Id.* at 105, n. 6.

The need for the application of a federal rule of decision is abundantly clear in the present case. The navigable waterway which is involved here is the Atlantic Ocean, and the interests sought to be protected are ones which affect the entire New Jersey coastal region. The Court of Appeals quite correctly observed that, "Relegating these litigants to possibly conflicting New York and New Jersey nuisance standards would ignore the clear intent of the Supreme Court to federalize those standards and would undermine that federal uniformity. These plaintiffs have sufficiently alleged pollution of in-

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8. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971).

terstate waters. In order to give full effect to the federal common law of nuisance recognized in *Illinois*, private parties should be permitted, and indeed encouraged, to participate in the abatement of such nuisances." (App. pp. 25a-26a).

Other courts have recognized that the *Illinois* decision should not be restricted to its particular facts. Both the Second and Third Circuits have held that the United States can state a claim for relief under the federal common law. *United States v. Ira S. Bushey & Sons*, 346 F. Supp. 145 (D.Vt. 1972), aff'd, 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974); *United States v. Stoeco Homes*, 498 F.2d 597 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975). Similarly, in *Township of Long Beach v. City of New York*, 445 F. Supp. 1203, 1214 (D.N.J. 1978), the court held that a municipality is entitled to bring an action based on the federal common law of nuisance. In *City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980), the plaintiffs were municipal corporations who were required to spend public funds because of pollution of an interstate waterway by acts done in another state. Standing to sue under the federal common law of nuisance was granted to those plaintiffs. Finally, in *Byram River v. Village of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975), the court extended standing to a private corporation (Byram River Pollution Abatement Association), a municipal corporation (the Town of Greenwich), and a private individual who owned land on the river's bank.

In opposition to respondents' standing under the federal common law of nuisance, petitioners rely on *Committee for Con. of Jones Falls Sewage System v. Train*, 375 F. Supp. 1148 (D.Md. 1974), affirmed on other grounds, 539 F.2d 1006 (4th Cir. 1976) (en banc); and *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275 (D.Conn. 1976), aff'd without opinion sub nom. *East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977).

Both cases involved pollution which was local in nature and effect. In *Parsell* the court stated that, "no interstate effect is alleged in the complaint. The impact of the spill appears to be limited to Bridgeport Harbor." 421 F. Supp. at 1281. As noted in Section B, the *Jones Falls* case also involved an "intrastate controversy" which was "entirely local." The majority opinion stated that, "It is not contended that the alleged pollution of Jones Falls Stream has any effect outside the State of Maryland, and no other state is complaining of it." 539 F.2d at 1009. Thus, dismissal of the claims based on the federal common law of nuisance in the *Parsell* and *Jones Falls* cases was appropriate because of the absence of an interstate effect of the conduct in question. See, *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492, 520 (8th Cir. 1975). The discussion of the standing of private parties under the federal common law of nuisance was therefore unnecessary to the holdings of these courts. It should further be noted that the Fourth Circuit in the *Jones Falls* case was closely divided; three of the participating judges dissented from the views of the five-judge majority.

In summary, the holding of the Third Circuit concerning the standing of private parties to sue under the federal common law of nuisance is consistent with this Court's decision in *Illinois v. City of Milwaukee*, and is also consistent with subsequent decisions by the lower courts.

2. *Monetary Damages Under the Federal Common Law of Nuisance*

As a logical extension of their narrow reading of this Court's decision in *Illinois v. City of Milwaukee*, petitioners have asserted that respondents' remedies under the federal common law of nuisance are limited to injunctive relief. This position was rejected by the Third Circuit, which reasoned that, "These plaintiffs have alleged sufficient individual damage to permit them to re-

cover damages for this essentially public nuisance . . . a private party may recover damages for a public nuisance if, while exercising the common right, he has suffered damages different in kind from those suffered by the public." (App. pp. 27a-28a). The Third Circuit went on to cite the Restatement (Second) of Torts §821C, illustration 11 and *Burges v. M/V Tamano*, 370 F. Supp. 247 (D.Me. 1973), where the court held that:

> [I]t would be incongruous to say that a man engaged in commercial fishing or clamming, and dependent thereon for his livelihood, who may have had his business destroyed by the tortious acts of another should be denied any right to recover for his pecuniary loss on the ground that his injury is no different in kind from that sustained by the general public.

Id. at 250.

The only Court of Appeals to consider the issue of the availability of monetary damages under the federal common law of nuisance is the Seventh Circuit. In the case of *City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980), the court reached a conclusion which supports the holding of the Third Circuit on this issue. The Seventh Circuit stated that, "Whether or not defendants have breached any obligations for which they should be held liable to plaintiffs will be determined by judge-made rules. The consequences of any breach of duty imposed by the courts are necessarily also determined by the court." 604 F.2d at 1019.

This approach is entirely consistent with the decisions of this Court, such as, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). In the *Lincoln Mills* case, this Court stated, "It is not uncommon for federal courts to fashion federal law where fed-

eral rights are concerned." 353 U.S. at 457. Similarly, in *Bivens* this Court stated:

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition . . . Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong." *Bell v. Hood*, 327 U.S. at 684.

403 U.S. at 395-96.

The only support cited by petitioners for the proposition that respondents' remedies should be limited to injunctive relief is their own narrow reading of *Illinois v. City of Milwaukee*. The holding of the Court of Appeals concerning the availability of monetary damages is consistent with the decisions of this Court and the Seventh Circuit. Thus, there is no conflict among the circuits on this issue, and therefore review by this Court is unnecessary.

D. The holding of the Court of Appeals that state sewerage authorities are municipal corporations to whom sovereign immunity under the Eleventh Amendment does not apply is consistent with the decisions of this Court.

Petitioners in No. 79-1711 and No. 79-1754 assert that they are entitled to the defense of sovereign immunity under the Eleventh Amendment in federal damage suits. The Third Circuit summarily rejected this argument, on the grounds that, "These defendants are municipal corporations as to whom sovereign immunity under the Eleventh Amendment does not apply." (App. p. 36a.) These petitioners candidly admit that this Court

has reiterated on several recent occasions "that municipalities and political subdivisions or agencies of states do not enjoy tort immunity for purposes of the Eleventh Amendment," citing, *Monell v. N.Y.C. Department of Public Service,* 436 U.S. 658, 690, n. 54 (1978); *Lafayette v. Louisiana Power and Light Co.,* 435 U.S. 389, 412 (1978); and *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 280 (1977). (Petition of Middlesex County Sewerage Authority, et al., at 28.) However, petitioners contend that one of the seminal cases in this area, *Lincoln County v. Luning,* 133 U.S. 529 (1890) has been incorrectly relied upon in subsequent cases to support the proposition that municipalities and counties do not constitute the state for Eleventh Amendment purposes. In effect, petitioners are asking this Court to overturn a very well established line of cases simply because of a dispute as to the precise holding of one of the earlier cases in that line of decisions.

Regardless of the merits of the *Lincoln County* case, it is clear that the protection afforded by the Eleventh Amendment is limited by its terms to "one of the United States." That only "states" fall within the protection afforded by the Eleventh Amendment was recently reiterated by this Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 400-01 (1979):

> It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But this Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities even though such entities exercise a "slice of state power."

The Middlesex petitioners further contend that *Mt. Healthy City Board of Education v. Doyle,* supra, requires resort to state law to determine whether "the nature of the entity" is more like a political subdivision or municipal corporation than like "an arm of the state." Although petitioners assert that resort to New Jersey law establishes that the New Jersey Tort Claims Act "has conferred upon them the aegis of state sovereignty" (Petition of Middlesex County Sewerage Authority, et al., at 30), a brief review of the statutes cited in petitioners' appendix does not support this proposition. "State" is defined in N.J.S.A. 59:1-3 as meaning the "State and any office, department, division, bureau, board, commission or agency of the State, *but shall not include any such entity which is statutorily authorized to sue or be sued.*" (App. p. 109a). Among the powers granted by N.J.S.A. 40:14A-7 to sewerage authorities is the right "to sue and to be sued." (App. p. 110a).

In *Mt. Healthy City Board of Education v. Doyle* this Court found that, "Under Ohio law the 'State' does not include 'political subdivisions,' and 'political subdivisions' do include local school districts." 429 U.S. at 280. So, too, in the present case, it is clear that under New Jersey law the "State" does not include sewerage authorities because sewerage authorities are authorized to sue or be sued. Moreover, as explained at page 5 of the Middlesex Petition, these sewerage authorites are not funded by the state. Thus, a judgment against a sewerage authority does not have "essentially the same practical consequences as a judgment against the state itself." *Lake Country Estates,* supra. Therefore, the Third Circuit's disposition of this issue was clearly correct.

E. The holding of the Court of Appeals that state tort claims acts may not preempt federal statutory or common law is mandated by the Supremacy Clause of the United States Constitution.

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

To the extent that respondents have causes of action founded upon federal statutes or federal common law, it is quite clear, based upon the provisions of the Supremacy Clause, that a state may not purport to restrict the exercise of those rights. It is the position of petitioners in No. 79-1711 and 79-1754 that they may not be sued based upon a federally created tort claim for damages unless the plaintiffs have complied with the provisions of the New Jersey Tort Claims Act. That Act provides for notice to be given to the public entity within ninety days after the accrual of the cause of action. N.J.S.A. 59:8-8 (App. p. 109a-110a.) If a state may by statute require a plaintiff asserting a federal right to notify a state public entity within ninety days of the accrual of action, what would prevent the state from imposing a thirty-day notice requirement, or even a one-day notice requirement? It is clear that where there is a federally created right, conflicting state law and policy must yield. See, e.g., *Gibbons v. Ogden,* 9 Wheat. (22 U.S.) 1, 210-211 (1824); *Hines v. Davidowitz,* 312 U.S. 52, 66-67 (1941); *Lee v. Florida,* 392 U.S. 378, 386 (1968); *Perez v. Campbell,* 402 U.S. 637, 649 (1971).

F. Although the decision of the Court of Appeals concerning the existence of a private cause of action to enforce the terms of the FWPCA and MPRSA conflicts with the decision of the Seventh Circuit in *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (1979), it would not be appropriate for this Court to resolve this conflict by reviewing the present case because of alternative causes of action available to plaintiffs under the theories of federal common law of nuisance and maritime tort.

Petitioners have sought review of the Third Circuit's decision holding that plaintiffs have a private cause of action under FWPCA and MPRSA on the grounds that the Third Circuit's decision in this regard is in conflict with the decision of the Seventh Circuit in *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (1979). As has been previously noted, the legislative history of FWPCA and MPRSA and the better reasoned cases which have interpreted those statutes indicated that they have in no way preempted the federal common law of nuisance. Moreover, the authorities also indicate that private parties have standing to bring suit under the federal common law of nuisance and that they are entitled to not only injunctive relief, but monetary damages as well as other relief.

Accordingly, since respondents are entitled to proceed on their federal common law of nuisance claim as well as their claim under the theory of maritime tort, it is unnecessary for this Court to resolve the conflict between the Third Circuit and the Seventh Circuit with respect to the issue of the existence of a private cause of action under FWPCA and MPRSA.

In the event that review is granted on one or more elements of respondents' claim based upon the federal common law of nuisance, it is respectfully submitted that the Third Circuit's analysis concerning the existence of a private cause of action implied from the terms of FWPCA and MPRSA, and preserved by the savings

clauses of those Acts, on behalf of individuals or groups of individuals who have been or will be injured by pollution, is correct, and should be affirmed by this Court.

CONCLUSION

The petitions for a writ of certiorari to the Third Circuit Court of Appeals should be denied.

Respectfully submitted,

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